

September 21, 2018

VIA ECF

Honorable Lorna G. Schofield
United States District Judge
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

RE: Contant, et al. v. Bank of America Corporation, et al., 17-cv-3139

Dear Judge Schofield:

Pursuant to this Court's September 12, 2018 Order (ECF No. 160), the undersigned defendants respectfully submit this letter brief addressing (1) what entities constitute "banks...regulated by federal agencies" under Fla. Stat. § 501.212(4)(c); and (2) each defendant's basis for asserting the bank exemption in the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et seq.*

Each of the undersigned defendants fell within this FDUTPA exemption during the applicable class period. "Banks . . . regulated by federal agencies" are outside the purview of FDUTPA. The terms "bank"¹ and "federal regulation" are neither defined nor otherwise limited by the text of the statute.² The legislative history and judicial interpretation of FDUTPA, however, make clear that the purpose of the exemption is to avoid subjecting banks and similar entities to dual sources of regulation. For instance, when the Florida legislature extended FDUTPA's exemption to credit unions, its reports explicitly stated that it was including credit unions in the exemption because, like banks, they are subject to a federal regulatory scheme and therefore FDUTPA coverage would be redundant. *See* Florida Senate Bill Analysis and Fiscal Impact Statement, SB 1620, 4/12/2017, at 3 ("Like banks, both state- and federally-chartered credit unions are subject to a number of regulations that provide some protections that overlap with FDUTPA"); Florida House of Representatives Final Bill Analysis, HB 1347, 5/3/2017, at 1 (same). Here, each defendant is subject to an extensive and comprehensive federal regulatory

¹ Black's Law Dictionary defines "bank" as, among other things: "A financial establishment for the deposit, loan, exchange, or issue of money and for the transmission of funds, organized in accordance with state or federal law; esp., a member of the Federal Reserve System." BLACK'S LAW DICTIONARY (10th ed. 2014). Here, the defendants are alleged to have engaged in foreign exchange transactions, e.g., the exchange of one currency instrument for another. Notably, plaintiffs themselves allege that the defendants are "banks." *See, e.g.*, ECF No. 139-1, Proposed Am. Compl. ¶¶ 69 (Defendants are "large bank dealers"), 95 (Defendant traders "communicate and socialize with traders at other Defendant banks."), 116 ("there are thousands of electronic communications between traders at two or more Defendant banks"), 153 ("dealer banks, such as Defendants"), 158 (same), 168 (same).

² FDUTPA was amended to add an exemption for banks six years after it was passed into law and contained no limitations on the definition of bank in the amendment. *See* Florida Senate Staff Analysis and Fiscal Impact Statement, SB 509, 5/23/1979, at 2. The legislature added no limitations when subsequently amending § 501.212(4). *See, e.g.*, 2004 Fla. Sess. Law Serv. Ch. 2004-390 (West).

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scheme that places it squarely within FDUTPA's bank exemption.³ *See, e.g., Bankers Tr. Co. v. Basciano*, 960 So.2d 773, 778-79 (Fla. Dist. Ct. App. 2007) (finding FDUTPA does not apply to banks and savings and loan associations regulated by the federal government).⁴

Three of the defendants are federally chartered banks regulated by the Federal Reserve and the Office of the Comptroller of the Currency, and are therefore exempt from FDUTPA.⁵ *See Helman v. Bank of Am.*, No. 12-80808-CIV, 2015 WL 13022509, at *3 (S.D. Fla. July 14, 2015) (noting that Bank of America, N.A. is regulated by the Office of the Comptroller of the Currency, a federal agency, and finding "Florida expressly exempts federally regulated banks such as [Bank of America, N.A.] from compliance with FDUTPA"), *aff'd*, 685 F. App'x 723 (11th Cir. 2017); *Jacobini v. JP Morgan Chase, N.A.*, No. 6:11-cv-231, 2011 WL 13248162, at *5 (M.D. Fla. Aug. 1, 2011) ("Plaintiff's FDUTPA claim fails as a matter of law because the statute does not apply to federally regulated banks such as Defendant.").⁶

Twenty-four defendants are bank holding companies ("BHCs") or BHC subsidiaries as defined by the Bank Holding Company Act, and therefore subject to federal regulation and exempt from FDUTPA.⁷ The Federal Reserve Board has comprehensive supervisory, regulatory, and enforcement authority over all BHCs in the instant action and their subsidiaries under the Bank Holding Company Act. *See Regions Bank v. Legal Outsource PA*, No. 2:14-cv-476, 2015

³ If the Court requires, each defendant can supplement this letter with further judicially noticeable factual support concerning its legal status.

⁴ *See, e.g.*, ECF No. 104, Mem. in Support of Defs.' Mot. to Dismiss at 26 n.17 (listing federal agencies regulating nearly all defendants); *In the Matter of the Royal Bank of Scotland Group plc et al.*, Order to Cease and Desist by the Board of Governors of the Federal Reserve System (July 26, 2011), available at <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20110727a1.pdf>. The Court can take judicial notice of documents filed with or retrieved from official government websites. *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F.Supp.3d 156, 166 (S.D.N.Y. 2015).

⁵ Bank of America, N.A., HSBC Bank USA, N.A., and JPMorgan Chase Bank, N.A. Indeed, plaintiffs concede that some defendants are national banks. ECF No. 139-1, Proposed Am. Compl. ¶¶ 21, 29-30.

⁶ A minority of courts have declined to dismiss federally chartered banks from FDUTPA suits in a Rule 12 posture because they seek a more developed record, not because FDUTPA permits suits against banks. *See, e.g., Christie v. Bank of Am., N.A.*, No. 813-cv-1371-T-23TBM, 2014 WL 5285987, at *4 (M.D. Fla. Oct. 15, 2014). The weight of authority—marshalled above—disagrees. Similarly, while some Florida courts have observed that "[n]othing in FDUTPA suggests that bank subsidiaries, affiliates or agents are necessarily exempt from FDUTPA," *Bankers Tr.*, 960 So. 2d at 779 (emphasis added), those entities may be properly exempt when they themselves are federally regulated, as defendants are here. Moreover, those courts also have not ultimately ruled that FDUTPA applies to defendants. *See, e.g., Renfrow v. First Mortg. Am., Inc.*, No. 08-80233-CIV, 2011 WL 2416247 (S.D. Fla. June 13, 2011).

⁷ BHCs are: Barclays Bank PLC, Bank of America Corporation, BNP Paribas, Deutsche Bank AG, The Goldman Sachs Group, Inc., HSBC North America Holdings, Inc., JPMorgan Chase & Co., Morgan Stanley, MUFG Bank, Ltd., and Standard Chartered.

BHC subsidiaries are: Barclays Capital Inc., Bank of America, N.A., BNP Paribas North America, Inc., BNP Paribas Prime Brokerage, Inc., BNP Paribas Securities Corp., Deutsche Bank Securities Inc., Goldman Sachs & Co. LLC, HSBC Bank USA, N.A., HSBC Securities (USA) Inc., JPMorgan Chase Bank, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co., LLC, Morgan Stanley & Co. International PLC, MUFG Bank, Ltd., and RBC Capital Markets, LLC.

WL 7777516, at *5 (M.D. Fla. Dec. 3, 2015) (taking judicial notice that the Federal Reserve Board regulates Regions Bank and therefore dismissing FDUTPA claims); *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1372 (S.D. Fla. 2009) (finding JPMorgan Chase & Co., a bank holding company, exempt from FDUTPA); *Patagonia Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 517 F.2d 803, 811 (9th Cir. 1975) (finding “Congress intended, by enacting [§ 1841(d)(3)], to expand the Board’s authority to identify and regulate bank holding company subsidiaries”).⁸

Twenty-four defendants are (or were during the class period) foreign banks, foreign banking organizations, and/or subsidiaries thereof, which are subject to the supervisory, regulatory, and enforcement authority of the Federal Reserve Board, among other federal agencies, pursuant to the International Banking Act of 1978—and therefore fall within the exemption to FDUTPA.⁹ See *Sovereign Bonds Exch. LLC v. Fed. Republic of Germany*, 899 F. Supp. 2d 1304, 1315–16 (S.D. Fla. 2010) (“[F]oreign banks are subject to federal regulation under the International Banking Act of 1978, 12 U.S.C. §§ 3101–11 . . . [a]ccordingly, the German Banks may not be subject to FDUTPA claims”), *aff’d sub nom. World Holdings, LLC v. Fed. Republic of Germany*, 701 F.3d 641 (11th Cir. 2012); see also 12 U.S.C. § 3105(c)(1)(A) (“The [Federal Reserve] Board may examine each branch or agency of a foreign bank . . . and other office or affiliate of a foreign bank conducting business in any State.”).

Finally, any argument that the banks here are not exempt from FDUTPA on the ground that the particular alleged conduct is not federally regulated is mistaken. Unlike other parts of § 501.212(4), subsection 4(c) offers no such parsing between regulated and unregulated conduct of a regulated bank and “the majority rule in Florida is that it is sufficient that the bank itself is federally regulated, and there is no need to examine whether the activity is federally regulated.” *Nino v. Flagstar Bank, FSB*, No. 16-14407, 2017 WL 9802627, at *3–6 (E.D. Mich. Dec. 31, 2017); see also *Bankers Tr.*, 960 So. 2d at 779 (FDUTPA excludes banks without considering the activity in question); *Sovereign Bonds Exch. LLC*, 899 F. Supp. 2d at 1315-16 (same). In any event, as plaintiffs themselves recognize, the fines that federal agencies have imposed on certain defendants for conduct related to allegations in this very case demonstrate the substantial degree to which the conduct at issue here is indeed subject to federal oversight. See ECF No. 139-1, Proposed Am. Compl., ¶¶ 187-88, 191, 200, 210, 212.

⁸ See 12 U.S.C. § 1841(a)(1), (d) (defining “bank holding company” and “subsidiary”); *Bloch v. Wells Fargo Home Mortg.*, No. 11-80434-CIV, 2012 WL 12862806, at *3-4 (S.D. Fla. June 13, 2012) (finding subsidiaries of national banks, including Bank of America, N.A., exempt from FDUTPA and noting that “the Supreme Court has held that operating subsidiaries of national banks are treated as equivalent to, and are subject to the same oversight, regulations, protections, and obligations as their national bank parent companies.”); see also, e.g., JPMorgan Chase & Co., Annual Report (Form 10-K), at 3 (Feb. 27, 2017) (“As a bank holding company and a financial holding company, JPMorgan Chase is subject to comprehensive consolidated supervision, regulation and examination by the Federal Reserve.”).

⁹ Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, BNP Paribas North America, Inc., BNP Paribas Prime Brokerage, Inc., BNP Paribas Securities Corp., Credit Suisse AG, Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Deutsche Bank AG, Deutsche Bank Securities Inc., HSBC North America Holdings, Inc., HSBC Bank plc, HSBC Bank USA, N.A., HSBC Securities (USA) Inc., MUFG Bank, Ltd., RBC Capital Markets, LLC, RBS plc, RBS Securities Inc., Société Générale, Standard Chartered, UBS AG, UBS Group AG, and UBS Securities, LLC.

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